83-168

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

CONSTRUCTION AND GENERAL LABORERS UNION LOCAL 304 and ALAMEDA BUILDING AND CONSTRUCTION TRADES COUNCIL,
Petitioners,

VS.

PAUL E. IACONO STRUCTURAL ENGINEER, INC.,
Respondent.

Petition For Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

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QUESTION PRESENTED

As a function of its supervisory powers over the lower courts, should not this Court articulate standards for the vicarious disqualification of an entire law firm which has employed a former government attorney so as to preclude such disqualification on appearance of impropriety grounds alone where no actual impropriety, taint or prejudice can be demonstrated, and the former government attorney has been effectively isolated from any involvement in the subject case?

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vs.

PAUL E. IACONO STRUCTURAL ENGINEER, INC.,
Respondent.

Petition For Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

Petitioners, Construction and General Laborers Union Local 304 and the Alameda Building and Construction Trades Council, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on May 3, 1983.

I

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is not yet reported and is set forth at Appendix A herein. The Magistrate's Recommendation Re Disqualification of Counsel, which was adopted by the

United States District Court for the Northern District of California, is not reported and is set forth at Appendix B herein.

II

JURISDICTION

The Judgment of the United States Court of Appeals for the Ninth Circuit was entered on May 3, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This Petition is timely filed with this Court under 28 U.S.C. § 2101(c).

III

REGULATIONS INVOLVED

This case involves Canon 9 and Disciplinary Rules 5-105(D) and 9-101(B) of the American Bar Association Code of Professional Responsibility. Canon 9 states: "A lawyer should avoid even the appearance of professional impropriety." Disciplinary Rule 5-105(D) provides: "If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment." Disciplinary Rule 9-101(B) provides: "A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee."

IV

STATEMENT OF THE CASE

On May 5, 1978, Paul E. Iacono Structural Engineer, Inc. (hereinafter "Iacono") filed its Complaint for Damages and Declaratory Relief against several defendants, including, *inter alia*, the Petitioners, Construction and

General Laborers Union Local 304 (hereinafter "Local 304") and the Alameda Building and Construction Trades Council (hereinafter "Council"). Federal jurisdiction was predicated upon Section 303 of the Labor Management Relations Act, 29 U.S.C. § 185. At this point, only two defendant labor organizations (Local 304 and the Council) are left in this suit. Iacono claims that these two labor organizations engaged in illegal secondary picketing of its Pleasanton, California job site in the spring of 1978. Substantial damages arising out of the construction delays are sought from the two labor organizations.

On April 23, 1981, Iacono filed a Motion for Order Disqualifying the Law Firm of Van Bourg, Allen, Weinberg & Roger. Iacono's motion to disqualify the law firm of Van Bourg, Allen, Weinberg & Roger (hereinafter "Van Bourg firm") is predicated upon that law firm's having hired one Paul Supton as an associate attorney on August 4, 1980. From approximately September 12, 1976, until August 4, 1980, Supton had been a staff attorney for the National Labor Relations Board (hereinafter "NLRB"). In the spring of 1978, Supton and several other NLRB attorneys were assigned to investigate five unfair labor practice charges filed by Iacono concerning picketing and other job site actions by Local 304, the Council and a Carpenters Local at Iacono's Pleasanton job site. These unfair labor practice charges are the basis of the instant lawsuit. In the course of his investigation, Supton interviewed several witnesses and took statements from them. Supton was also assigned to prepare one of the cases for trial, but it never went to trial. Nor was it presented to the District Court for injunction proceedings pursuant to Section 10(l) of the National Labor Relations Act, as

amended (hereinafter "NLRA"), 29 U.S.C. § 160(l). No one from the Van Bourg firm ever met or dealt with Supton concerning the unfair labor practice charges filed by Iacono.

The statements which Supton took were turned over to another NLRB attorney, who used them in preparing a related matter for an injunction proceeding in the District Court under Section 10(l) of the NLRA. These statements are a matter of public record since they were presented to the District Court and furnished to all the parties at the time that the Regional Office of the NLRB filed for a preliminary injunction.

Since starting work at the Van Bourg firm, Supton has not worked on any matters involving Iacono, nor has he been assigned to work on any such matters. In addition, Supton has not disclosed any information to any members or employees of the Van Bourg firm relating to his involvement with Iacono during his tenure at the NLRB. Supton has no financial involvement in this case. As a salaried employee (or associate), Supton's compensation will be unaffected by the outcome of the instant action. In addition, since the Van Bourg firm represents the *defendants* in a suit for damages, there is *no* possibility that the Van Bourg firm will recover any monetary settlement or judgment in the instant litigation.

Disqualification of the Van Bourg firm at this time would mean that over three years' work would be wasted and that the Petitioners would suffer severe hardships as a result. The disqualification would cause the Petitioners additional expenses by way of attorneys' fees in the thousands of dollars (since any new counsel must become

acquainted with the legal and factual issues involved in this litigation and must prepare for the matter anew), and would result in even further delays.

Iacono's motion for disqualification does not challenge the integrity of Supton or the Van Bourg firm. At issue in its motion is the alleged appearance of impropriety created by Supton's association with the Van Bourg firm. Iacono's motion for disqualification is based on Canon 9 of the American Bar Association Code of Professional Responsibility (hereinafter "ABA Code") and Disciplinary Rules (hereinafter "DR") 5-105(D) and 9-101(B) of the ABA Code. The essence of Iacono's argument is that, because of Supton's involvement in the investigation of unfair labor practice charges filed by Iacono during his tenure at the NLRB, Supton is disqualified by DR 9-101(B) from representing the Petitioners in the present action, and the disqualification of Supton is extended to the entire Van Bourg firm by DR 5-105(D).

On June 26, 1981, the Honorable William H. Orrick, United States District Judge for the Northern District of California, approved United States Magistrate Frederick J. Woelflen's Recommendation Re Disqualification of Counsel and ordered that Supton and the entire Van Bourg firm be disqualified from any further representation of the Petitioners in this case.

After reviewing the record in this case, the District Court noted, in its order disqualifying the Van Bourg firm, that the disqualification motion "makes no charges direct or indirect by innuendo or inference of any unethical conduct on the part of Mr. Supton or the Van Bourg firm regarding this case." App. B at 6. Rather, the "sole basis" of the dis-

qualification motion "is the possibility or appearance of the possibility of impropriety on the part of an attorney because of his prior representations of a client. Actual disclosure of privileged client information is not at issue here." App. B at 6-7. The District Court found that Supton did not have substantial responsibility for investigating the unfair labor practice charges filed by Iacono with the NLRB. In addition, the District Court was careful to point out in its disqualification order that there was nothing in the record which would indicate that Supton accepted employment with the Van Bourg firm because of that firm's involvement in this litigation. App. B at 8. Finally, the District Court made a specific finding that "there has been no unethical conduct carried out by Mr. Supton or the Van Bourg law firm with respect to this litigation." App. B at 10.

The Ninth Circuit affirmed the District Court's disqualification order. In doing so, the Ninth Circuit concluded that Supton's disqualification was required both by Canon 9 and DR 9-101(B).[1] To support its holding that the entire Van Bourg firm must also be disqualified, the Ninth Circuit pointed to its decision in *Trone v. Smith*, 621 F.2d 994, 999 (9th Cir. 1980),[2] and the language of DR 5-105(D) itself.

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[1]The District Court did not find a violation of DR 9-101(B). The Ninth Circuit, in concluding that DR 9-101(B) had been violated, determined that "the trial court's finding that Supton's personal involvement in investigating the Iacono charges while at the NLRB did not amount to substantial responsibility was clearly erroneous." App. A at 25.

[2]In *Trone v. Smith*, the Ninth Circuit held that "[o]nce the attorney is found to be disqualified, both the attorney and the attorney's firm are disqualified from suing the former client." 621 F.2d at 999.

After stating the holding in *Trone v. Smith* and quoting the language of DR 5-105(D), the Ninth Circuit concluded: "Since Supton is disqualified from representation of the defendants in the Iacono matter, disqualification of Van Bourg appears necessary." App. A at 27.

The Petitioners urged the Ninth Circuit to adopt a limited exception to firmwide vicarious disqualification where the attorney who must be disqualified is effectively screened from financial interest and participation in the case and where the attorney's prior representation was in the capacity of a government employee. The Ninth Circuit found that the record in this case did not show that a "Chinese wall" screening procedure was in place at the Van Bourg firm. The Ninth Circuit explained:

> "'Although the record shows that Supton did not work on the Iacono case while at the Van Bourg firm and did not enter a formal appearance in the case, there is no evidence that a "Chinese wall" was in place at the Van Bourg firm. A Van Bourg attorney stated that at the time Supton was hired, the firm had made no effort to determine what matters Supton had handled or been in contact with while at the NLRB and indeed that the firm 'never asks' about what was learned at a prior employment. Moreover, there is no evidence of specific measures the firm took to avoid either inadvertent or intentional disclosure of information concerning Supton's involvement in this case either directly or indirectly." App. A at 28-29.

As a result, the Ninth Circuit found that the District Court did not err in holding the Van Bourg firm disqualified.

V

REASONS WHY THE PETITION SHOULD BE GRANTED

The overwhelming weight of authority, in cases where government attorneys have entered private practice, is on the side of rejecting firmwide disqualification motions which, like the instant motion, are based on the mere "appearance of impropriety" and where the former government attorney has been effectively screened from financial interest and participation in the case. The Ninth Circuit's decision in this case is in conflict with this established authority.

The issue of vicarious disqualification of a former government employee's current law firm was the subject of Formal Opinion 342 of the American Bar Association Committee on Ethics and Professional Responsibility (November 24, 1975), *reprinted in* 62 A.B.A.J. 517 (1976). In Formal Opinion 342, the ABA Ethics Committee acknowledged that a literal reading of DR 5-105(D) in conjunction with DR 9-101(B) might arguably warrant vicarious disqualification of private law firms in many situations where former government attorneys entered their employ. Formal Opinion 342 recognized, however, that in the context of government attorneys entering private practice, many important policy considerations militate against disqualifying the entire law firm:

> "There are, however, weighty policy considerations in support of the view that a special disciplinary rule relating only to former government lawyers should not broadly limit the lawyer's employment after he leaves government service. Some of the underlying considerations favoring a construction of the rule in a manner

> not to restrict unduly the lawyer's future employment are the following: the ability of government to recruit young professionals and competent lawyers should not be interfered with by imposition of harsh restraints upon future practice nor should too great a sacrifice be demanded of the lawyers willing to enter government service; the rule serves no worthwhile public interest if it becomes a mere tool enabling a litigant to improve his prospects by depriving his opponent of competent counsel; and the rule should not be permitted to interfere needlessly with the right of litigants to obtain competent counsel of their own choosing, particularly in specialized areas requiring special technical training and experience." (Footnotes omitted.) 62 A.B.A.J. at 518-19.

The Opinion noted that "[p]ast government employment creates an unusual situation in which inflexible application of DR 5-105(D) would actually thwart the policy considerations underlying DR 9-101(B)." *Id.* at 520.

In light of these policy considerations, the ABA Ethics Committee took the position that, if the former government attorney is adequately screened from participation in the matters that were pending in the government agency at the time of his or her tenure, then disqualification of the former government employee's current law firm is not required or warranted:

> "DR 9-101(B)'s command of refusal of employment by an individual lawyer does not necessarily activate DR 5-105(D)'s extension of that disqualification. The purposes of limiting the mandate to matters in which the former public employee had a substantial responsibility are to inhibit government recruitment as little as possible and enhance the opportunity for all litigants to obtain competent counsel of their own choos-

ing, particularly in specialized areas. An inflexible extension of disqualification throughout an entire firm would thwart those purposes. So long as the individual lawyer is held to be disqualified and is screened from any direct or indirect participation in the matter, the problem of his switching sides is not present; by contrast, an inflexible extension of disqualification throughout the firm often would result in real hardship to a client if complete withdrawal of representation was mandated, because substantial work may have been completed regarding specific litigation prior to the time the government employee joined the partnership, or the client may have relied in the past on representation by the firm.

All of the policies underlying DR 9-101(B), including the principles of Canons 4 and 5, can be realized by a less stringent application of DR 5-105(D). The purposes, as embodied in DR 9-101(B), of discouraging government lawyers from handling particular assignments in such a way as to encourage their own future employment in regard to those particular matters after leaving government service, and of avoiding the appearance of impropriety, can be accomplished by holding that DR 5-105(D) applies to the firm and partners and associates of a disqualified lawyer who has not been screened . . . from participation in the work and compensation of the firm on any matter over which as a public employee he had substantial responsibility. Applying DR 5-105(D) to this limited extent accomplishes the goal of destroying any incentive of the employee to handle his government work so as to affect his future employment. Only allegiance to form over substance would justify blanket application of DR 5-105(D) in a manner that thwarts and distorts the policy considerations behind DR 9-101(B)." *Id.* at 521.

Since the issuance of Formal Opinion 342, courts which have considered the issue have overwhemingly adopted the position of the ABA Ethics Committee that adequate screening should normally preclude firmwide disqualification. For example, in *Kesselhaut v. United States,* 555 F.2d 791 (Ct. Cl. 1977), the Court of Claims applied the rationale of Formal Opinion 342 in vacating a trial court order disqualifying the law firm of Krooth and Altman. The Kesselhaut firm had represented the Federal Housing Administration (FHA) at the time that Adolphus Prothro was general counsel of the FHA. Subsequently, the Kesselhaut firm retained the law firm of Krooth and Altman in an action to recover fees from the FHA. Prothro was a member of the Krooth and Altman firm. The Court of Claims determined that Krooth and Altman had followed a screening procedure sufficient to isolate Prothro from the subject case so that disqualification of the entire firm was not justified. The court's discussion of the merits of screening, as opposed to mechanical, vicarious disqualification, is applicable in the instant case:

> "We share the view expressed in the above-mentioned Formal Opinion 342 that an inexorable disqualification of an entire firm for the disqualification of a single member or associate, is entirely too harsh and should be mitigated by appropriate screening such as we now have here, when truly unethical conduct has not taken place and the matter is merely one of the superficial appearance of evil, which a knowledge of the facts will dissipate. We note that the thousands of attorneys employed in Government do not, for the most part, have Civil Service protection, and are subject to removal without cause at any time. Personal disqualifications may be few in the cases of 'journeyman' attorneys, but

> will be extensive in the case of one holding high supervisory responsibility, like Mr. Prothro. Should an attorney, having left Government perhaps contrary to his own volition, ineluctably infect all the members of any firm he joined with all his own personal disqualifications, he would take on the status of a Typhoid Mary, and be reduced to sole practice under the most unfavorable conditions. . . .
>
> The iron rule urged by the trial judge would act as a strong deterrent to the acceptance of Government employment by the most promising class of young lawyers. Indeed, in fairness to them, it would be necessary to warn them before signing on, of the disabilities likely to be incurred at a later date. Attorneys having both private and Government experience are often better qualified to be of value to courts, as their officers, and to their clients, public and private, than those having one or the other experience alone. If interchange between the private and public sectors of the bar is to be halted, and careers in such sectors made matters of separate tracks that will never converge, it should be only upon full consideration of all the legal incidents of Government employment of lawyers, and it should be done overtly, and not achieved as a collateral consequence of a disciplinary rule ostensibly having other purposes." *Id.* at 793-94.

See also Sierra Vista Hospital, Inc. v. United States, 639 F.2d 749 (Ct. Cl. 1981).

A similar approach has been followed by the Second Circuit, first in *Board of Education v. Nyquist*, 590 F.2d 1241 (2d Cir. 1979), and then in *Armstrong v. McAlpin*, 625 F.2d 433 (2d Cir. 1980) *(en banc)*, *vacated on other grounds*, 449 U.S. 1106 (1981). In both cases, the Second Circuit expressed its considerable reluctance to disqualify a

firm where the primary concern is the appearance of impropriety, and cited a number of reasons for such reluctance: (1) disqualification has an immediate adverse effect on the clients by separating them from the counsel of their choice; (2) disqualification motions are often interposed for tactical reasons; (3) even when made in the best of faith, such motions inevitably cause delay; and (4) comprehensive federal and state disciplinary machinery is available to remedy alleged ethical violations, thus making it unnecessary to disrupt the pending litigation. The Second Circuit concluded that "when there is no claim that the trial will be tainted, appearance of impropriety is simply too slender a reed on which to rest a disqualification order except in the rarest of cases." *Nyquist*, 590 F.2d at 1247.

In *Armstrong*, the Second Circuit, in an *en banc* ruling, adopted the restrained approach to firmwide disqualification which was enunciated in *Nyquist*. The court aptly noted that granting a disqualification motion can be more likely to heighten public skepticism about the judicial system than denying such a motion:

> ". . . While sensitive to the integrity of the bar, the public is also rightly concerned about the fairness and efficiency of the judicial process. . . . Thus, rather than heightening public skepticism, we believe that the restrained approach this court had adopted towards attempts to disqualify opposing counsel on ethical grounds avoids unnecessary and unseemly delay and reinforces public confidence in the fairness of the judicial process." *Armstrong*, 625 F.2d at 446.

Similar opinions about the causes of public skepticism towards the judicial system were expressed by the Fifth Cir-

cuit in *Woods v. Covington County Bank*, 537 F.2d 804, 813 (5th Cir. 1976):

> "It does not follow, however, that an attorney's conduct must be governed by standards which can be imputed only to the most cynical members of the public. Inasmuch as attorneys now commonly use disqualification motions for purely strategic purposes, such an extreme approach would often unfairly deny a litigant the counsel of his choosing. Indeed, the more frequently a litigant is delayed or otherwise disadvantaged by the unnecessary disqualification of his lawyer under the appearance of impropriety doctrine, the greater the likelihood of public suspicion of both the bar and the judiciary. An overly broad application of Canon 9, then, would ultimately be self-defeating." (Footnote omitted.)

The Fifth Circuit noted further that "[i]nasmuch as attempts to disqualify opposing counsel are becoming increasingly frequent, we cannot permit Canon 9 to be manipulated for strategic advantage on the account of an impropriety which exists only in the minds of imaginative lawyers." *Id.* at 819.[3]

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[3]Recent cases affirming vicarious firmwide disqualification are factually inapposite, either because they do not involve former government attorneys (and the attendant policy considerations concerning government recruitment, etc.) or because there are other significant factual distinctions. For example, *Trone v. Smith*, 621 F.2d 994 (9th Cir. 1980), heavily relied upon by Iacono before the District Court and cited in the District Court's order granting disqualification and in the Ninth Circuit's opinion, involved a private lawyer, not a government lawyer, who represented a particular client in connection with a securities transaction. At a later date, the same attorney represented another client in litigation against his former client. Rather than being screened from participation in the subsequent litigation, this attorney was personally involved in it.

The foregoing authorities compel the conclusion that the District Court erred in ordering (and the Ninth Circuit erred in affirming) the disqualification of the Van Bourg firm. The decision to disqualify the entire Van Bourg firm, a bold example of the discredited prophylactic application of DR 5-105(D), is based upon mere speculation and hypothesis. There is no evidence in the record of actual impropriety, taint, prejudice or affirmative wrongdoing. The District Court's disqualification order is based on the mere "appearance of impropriety." The Ninth Circuit described this case as involving "a former government attorney whose prior representation involved the *possible* disclosure of confidences by private parties." (Emphasis supplied.) App. A at 23. Petitioners respectfully submit that vicarious disqualification of the entire Van Bourg firm is totally unwarranted because the disqualification is based on appearance of impropriety grounds alone where no actual impropriety, taint or prejudice can be demonstrated. This Court, in *Firestone Tire & Rubber Company v. Risjord*, 449 U.S. 368, 376 (1981), implied that a showing of the "possibility" of taint to judicial proceedings is insufficient for disqualification. *See also Armstrong*, 625 F.2d at 445-46. Iacono has failed to show any concrete evidence of taint. Under these circumstances, the "appearance of impropriety is simply too slender a reed on which to rest a disqualification order . . . particularly . . . where . . . the appearance of impropriety is not very clear." *Id.* at 445; *Nyquist*, 590 F.2d at 1247.

Disqualification of the entire Van Bourg firm is also unwarranted because Supton has been effectively isolated from the subject case. Since starting work at the Van Bourg

firm, Supton has not worked on any matters involving Iacono. In addition, Supton has declared that he has not and will not discuss this case with anyone. Finally, Supton has no financial interest in this case. Iacono does not challenge the integrity of Supton or the Van Bourg firm. Indeed, the District Court made a specific finding that there has been no unethical conduct carried out by Supton or the Van Bourg firm with respect to this litigation. Thus, Supton has been effectively isolated from any participation in this litigation. Iacono has presented no evidence to the contrary. While acknowledging that the record showed that Supton did not work on the Iacono case while at the Van Bourg firm, the Ninth Circuit nevertheless focused on the lack of evidence of "specific measures the firm took to avoid either inadvertent or intentional disclosure of information concerning Supton's involvement with this case either directly or indirectly." App. A at 29. It is this lack of evidence of a formal "Chinese wall" which appears to be determinative in the Ninth Circuit's decision. However, the Ninth Circuit fails to indicate why Supton's *de facto* isolation from the subject case is not sufficient to preclude firmwide disqualification. Here it is undisputed that Supton has never participated in this litigation or discussed this case with anyone since starting work at the Van Bourg firm. Thus, Supton has been effectively isolated from any participation in this litigation. That Supton was effectively isolated from any participation in this litigation should be determinative with regard to the issue of vicarious firmwide disqualification, irrespective of the establishment, *vel non*, of a formal "Chinese wall." In view of the fact that Supton has been effectively isolated from any involvement in this case, and the absence of any actual impropriety on

the part of Supton or the Van Bourg firm, disqualification of the entire Van Bourg firm is totally unwarranted.

Any concern for an appearance of impropriety in this case is greatly outweighed by the significant policy considerations militating against vicarious firmwide disqualification. Since this case was filed more than five years ago, disqualification at this late date would have a severe adverse impact on the Petitioners (who are innocent bystanders in this situation) and would unnecessarily delay the underlying litigation. Where, as here, disqualification motions are made after years of pre-trial proceedings, the disqualification order would necessitate a lengthy postponement so that new counsel may be retained and familiarized with the case. The added expense to Petitioners would be substantial in view of the added legal fees that would be entailed in familiarizing a new law firm with the case. Disqualification would also deprive Petitioners of their right to choose their own legal counsel.

The cases cited *supra* allude to the potential interference with government recruitment if vicarious firmwide disqualifications are sanctioned. It is not farfetched to predict that NLRB attorneys would indeed become (in the words of one court) "Typhoid Marys" insofar as private law firms are concerned, should the risk of vicarious firmwide disqualification be significant. At any given time, every private law firm having a significant labor law practice has matters pending before the local NLRB office. No law firm will be willing to risk disqualification from such pending matters. Thus, NLRB attorneys will be virtually locked in to their employment with the agency. More importantly, the NLRB's recruitment efforts will be severely hampered. No attorney

who wishes to leave open the option of future private employment would seriously consider employment with the NLRB. The quality of the NLRB legal staff would suffer commensurately.

Given the undisputed facts that the former government attorney was effectively isolated from any involvement in the subject case and that there is only a possibility of an appearance of impropriety unsupported by any evidence of actual impropriety, prejudice or taint, this case virtually screams out for this Court to exercise its supervisory powers to articulate standards for the vicarious disqualification of an entire law firm which has employed a former government attorney.

CONCLUSION

For the reasons suggested above, the Petition for a Writ of Certiorari should be granted.

Dated: August 1, 1983

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PAUL E. IACONO STRUCTURAL ENGINEERS, INC.,	No. 81-4360
Plaintiff-Appellee,	D. C. No. C-78-1006-WHO
v.	OPINION
ROBERT R. HUMPHREY, etc., et al.,	
Defendants-Appellants.	

Appeal from the United States District Court for the Northern District of California
William H. Orrick, District Judge, Presiding.

Submitted: September 17, 1982

BEFORE: FLETCHER and BOOCHEVER, Circuit Judges, and KENYON,* District Judge.

KENYON, District Judge:

This is an appeal from a final order of the district court disqualifying the law firm representing the defendants in an action based on alleged unfair labor practices of the defendants. The district court disqualified the firm on the ground that one of the attorneys of the firm, prior to his employment by the firm, had been a staff attorney to the National Labor Relations Board (NLRB) and in that capacity had investigated the same unfair labor practices that are

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* Honorable David V. Kenyon, United States District Judge for the Central District of California, sitting by designation.

the subject of this action. We have jurisdiction under 28 U.S.C. § 1291 (1976) and affirm.[1/]

FACTS

In the spring of 1978, plaintiff-appellee Paul E. Iacono Structural Engineers, Inc. (Iacono) filed several unfair labor practice charges with the NLRB. Iacono contended that secondary picketing and leafleting by the several labor unions at one of Iacono's job sites violated Section 8(b) of the National Labor Relations Act, 29 U.S.C. § 158(b)(1976). Iacono also filed an unfair labor practice charge against Carpenters Local Union No. 1622 (Local 1622), a member of defendant Alameda Building and Construction Trades Council Alameda (Alameda) for refusing to cross the

picket lines of defendants.

Together with several other NLRB attorneys, Paul Supton was assigned to investigate Iacono's charges and prepare them for trial. He became actively involved in the investigation of several of the charges and interviewed and took statements from a number of Iacono's key employee-witnesses. A statement taken by Supton from a job superintendent at Iacono's job site, for example, describes in detail the interruptions in work caused by defendants' secondary picketing and distribution of leaflets. Similarly, another statement taken by Supton from an employee of Iacono describes among other things, picketing by the defendants on certain dates and the refusal of Local 1622 to cross

defendant's picket lines. During the investigation of the charges filed against Local 1622, Supton had numerous discussions with Iacono's attorney regarding the plaintiff company and all aspects of the picketing by the defendants. The record also contains letters from Supton to Iacono's attorney pertaining to the sufficiency of Iacono's evidence against Local 1622 and a proposed settlement.

In the meantime, on May 5, 1978, Iacono filed a complaint against the defendants[2/] in federal court, contending that construction delays and other injuries to Iacono's business and property that had resulted from defendants' secondary picketing and leafleting gave rise to a private

claim for damages and declaratory relief under section 303 of the Labor Management Relations Act, 29 U.S.C. § 187 (1976). Defendants retained the law firm of Van Bourg, Allen, Weinberg & Roger (Van Bourg) for their defense in the district court action.

On August 4, 1980, Supton left the NLRB and joined Van Bourg as an associate. At the time Van Bourg hired Supton, the firm had no knowledge of Supton's involvement in the Iacono matter while he was at the NLRB. Furthermore, Supton never did any legal work on the Iacono case for the Van Bourg firm and did not make a formal appearance in the action.[3/] Nevertheless, the law firm did not prohibit discussions between Supton

and other Van Bourg attorneys with regard to the Iacono matter, or otherwise take any measures, formal or informal, to isolate Supton from Van Bourg attorneys working on the Iacono matter in order to ensure that Supton's pre-hiring knowledge would not intentionally or accidentally be disseminated to other members of the firm. Nor was he excluded from all financial reward from the case that might be reflected in year-end bonuses or the like.

Over eight months after Supton joined Van Bourg, Iacono filed a motion for an order disqualifying Van Bourg from further representation of the defendants in the Iacono case, claiming that Canon 9 and certain disciplinary rules of the American Bar

Association Model Code of Professional Responsibility (the Model Code) mandated disqualification. On June 26, 1981, the district court ordered Van Bourg disqualified. The court held that Supton did not have "substantial responsibility" for the Iacono matter while at the NLRB and thus neither he nor Van Bourg had violated Disciplinary Rule 9-101(B) of the Model Code. Nonetheless, the court held that Van Bourg's representation of the defendants failed to maintain an "appearance of propriety" and thus violated Canon 9 of the Model Code.

STANDARD OF REVIEW

Since the district court has primary responsibility for controlling the conduct of attorneys practicing

before it, Trone v. Smith, 621 F.2d 994, 999 (9th Cir. 1980), an order disqualifying counsel will not be disturbed if the record reveals "any sound" basis for the court's action, Gas-A-Tron of Arizona v. Union Oil Co. of California, 534 F.2d 1322, 1325 (9th Cir.), cert. denied, 429 U.S. 861 (1976). Thus, we will not reverse the district court unless the court either misperceives the relevant rule of law, Trone, 621 F.2d at 999, or abuses its discretion, Gas-A-Tron, 534 F.2d at 1325 (grant of disqualification motion overturned where facts did not support district court's finding that the prior and present representations were substantially related).

DISCUSSION

Defendants challenge the disqualification order on four grounds: (1) that the ethical rules applicable to lawyers practicing before the district court do not include the provisions of the Model Code; (2) that, even if the provisions of the Model Code are applicable, Supton's representation of defendants does not create an appearance of impropriety; (3) that, even if Supton must be disqualified, the remainder of the Van Bourg firm need not be disqualified; and (4) that, in any event, Iacono waived its right to secure Van Bourg's disqualification by delaying eight months. We examine these contentions in turn.

I. Applicability of Model Code in District Court.

Defendants argue first that the district court erred in using the provisions of the Model Code to disqualify Van Bourg because the local rules of the Northern District of California, unlike those of other district courts in California, do not specifically adopt the provisions of the Model Code as ethical rules governing the practice of lawyers appearing before that court. We disagree with the conclusion that to have force the Model Code must be specifically adopted.

The Model Code is itself not law but rather merely a suggested body of ethical principles and rules upon which reasonable lawyers, concerned about the proper role of the legal profession in

American society, have reached a consensus. Since "[a]dvance notice is essential to the rule of law" and since "it is desirable that an attorney or client be aware of what actions will not be countenanced," In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 658 F.2d 1355, 1360 (9th Cir 1981), cert. denied, 102 S.Ct. 1615 (1982), the provisions of the Model Code, standing alone, present no just basis for disqualification of a lawyer. Until the Model Code is adopted as law by the courts, the legislature, or the regulatory authority charged with the discipline of lawyers in a particular jurisdiction, the canons and disciplinary rules of the Model

Code are merely hortatory, not proscriptive. See id. at 1359 n.5 (upholding disqualification based on violation of provision of Model Code where "the reference to the ABA Code in Local Rule 1.3(d) sufficiently invokes Canon 9 as to make it a basis" for disqualification).

In the federal system, the regulation of lawyer conduct is the province of the courts, not Congress. See Gas-A-Tron of Arizona v. Union Oil Co. of California, 534 F.2d 1322, 1324 (9th Cir. 1976). In the absence of rules promulgated by higher authorities in the judicial system, the district courts are free to regulate the conduct of lawyers appearing before them. See id. at 1325. The local rules of the Northern District

of California, unlike those of several other federal districts in California,[4/] do not specifically adopt the provisions of the Model Code as ethical rules governing the practice of lawyers before the federal courts in that district. Local Rule 110-3 of the Northern District makes no mention of the Model Code:

> Every member of the Bar of this Court and any attorney permitted to practice in this Court under Local Rule 110-2 shall be familiar with and comply with the standards of professional conduct required of members of the State Bar of California and contained in the State Bar Act, the Rules of Professional Conduct of the State Bar of California and decisions of any court applicable thereto which are hereby adopted.

N.D. Cal. R. 110-3; cf. Petroleum Products Antitrust Litigation, 658 F.2d at 1359 n.5 (upholding disqualification

under Canon 9 where local court rule made explicit reference to Model Code). Nor do the State Bar Act of California and the Rules of Professional Conduct of the State Bar of California, which laws are explicitly referred to in the federal court rule, contain a counterpart to Canon 9 of the Model Code or incorporate the provisions of the Model Code as standards of professional conduct required of California lawyers.[5/] Nonetheless, recent decisions of the California courts ruling on the professional standards required of California lawyers use the Model Code as a source of ethical standards to supplement and explicate the principles and rules set forth in the California State Bar Act and Rules of Professional Conduct of the State Bar of California

covering certain conduct where the state bar act and rules are imprecise or incomplete. See, e.g., Chambers v. Superior Court, 121 Cal.App.3d 893, 898-903, 175 Cal.Rptr. 575, 578-581 (1981); Chadwick v. Superior Court, 106 Cal.App.3d 108, 116-18, 164 Cal. Rptr. 864, 868-69 (1980); Bruno v. Bell, 91 Cal.App.3d 776, 787-88, 154 Cal.Rptr. 435, 441-42 (1979).[6/] But cf. People v. Ballard, 104 Cal. App.3d 757, 761, 164 Cal.Rptr. 81, 83 (1980)(dictum)(stating that "conduct of California attorneys is governed by California Rules of Professional Conduct" not ABA Model Code).

Since the California courts cite and apply the Model Code as a source of ethical principles and rules

governing California lawyers, we believe that the district court's determination that the Model Code is a basis for disqualification under its local rule was not error. See N.D.Cal.R. 110-3 (requiring lawyers to comply with "decisions of any court applicable" to "standards of professional conduct" of California lawyers). We therefore reject defendants' argument that the district court misperceived the applicable law when it looked to the Model Code as a source of ethical standards under Local Rule 110-3 of the Northern District of California. See Petroleum Products Antitrust Litigation, 658 F.2d at 1360-61.

II. Supton's Violation of Disciplinary Rule 9-101(B).

Defendants contend next that even if the provisions of the Model Code are applicable, no violation of the Code standards occurred here. They argue that since a former government attorney is disqualified under Model Code Disciplinary Rule 9-101(B) from participating in a new matter as a private attorney only if he had "substantial responsibility" over the same matter as a public employee and since the district court here concluded that Supton did not have substantial responsibility over the Iacono matter while he was with the NLRB, Supton's disqualification is not required under the Model Code. We disagree.

Canon 9 of the Model Code states that "a lawyer should avoid even the appearance of professional impropriety." Model Code Canon 9 (1979). Our court has construed this rule to require disqualification based on prior employment wherever the former representation is "substantially related" to the current representation and the current representation is adverse to the former representation. Trone v. Smith, 621 F.2d 994, 998 (9th Cir. 1980). A substantial relationship is present "if the factual contexts of the two representations are similar or related," regardless of "whether confidences were in fact imparted to the lawyer by the client" in the prior representation. Id. at 998-99. Supton's representation

of the defendants clearly meets this test, since the charges he investigated at the NLRB are based on the same incidents that are the subject of this lawsuit and since representation of the defendants is obviously adverse to that of Iacono.[7/] If Canon 9 of the Model Code were alone applicable to Supton's present representation of defendants, his disqualification would surely be required.

Defendants argue, however, that this court's construction of Canon 9, requiring disqualification wherever prior and present adverse representation are substantially related, should be applied only where the prior representation involved a nongovernmental client, since a disciplinary rule of

the Model Code specifically addresses the situation where a lawyer's prior representation occurred while the lawyer was a public employee. Defendants argue that because that rule states that "a lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee," Model Code DR 9-101(B) (1979), a former government lawyer should not be disqualified absent a clear showing of such "substantial responsibility."[8/]

While strong policy reasons may exist for limiting disqualification of former government lawyers to those matters over which they previously exercised substantial responsibility,[9/] such considerations may be less applic-

able or inappropriate when the party seeking disqualification is not the former government agency in which the attorney was employed but a private party from whom the lawyer may have received confidential information while he was in government employment. Cf. Chambers v. Superior Court, 121 Cal. App.3d 903, 175 Cal.Rptr. 575 (1981) (denying disqualification requested by State of California of former California Department of Transportation attorney under "substantial responsibility" test); Kesselhaut v. United States, 555 F.2d 791 (Ct.Cl. 1977)(denying disqualification requested by FHA of former FHA attorney in lawsuit brought against FHA to recover fees); ABA Comm. on Ethics and Professional

Responsibility Formal Op. 342, at 4-5 & n.14, 11 (1975), reprinted in 62 A.B.A.J. 517, 518 & n.14, 521 (1976) (discussing disqualification solely in terms of whether post-employment restrictions hurt "government more than they help it" and whether "government agency concerned" is satisfied with former government attorney's new representation, without mentioning that in some cases non-governmental interests might be involved).

We need not decide in this case, however, whether a former government attorney whose prior representation involved the possible disclosure of confidences by private parties may be disqualified in a future representation under a standard other than the sub-

stantial responsibility standard, since the facts here show that Supton had substantial responsibility as an NLRB attorney over the same matter that is the subject of the present action.

While the Model Code does not define "substantial responsibility," the ABA Committee on Ethics and Professional Responsibility has interpreted the term to mean a responsibility which required the former government attorney "to become personally involved to an important, material degree in the investigative or deliberative processes regarding the transactions or facts in question." See ABA Comm. on Ethics and Professional Responsibility Formal Op. 342, at 9

(1975), reprinted in 62 A.B.A.J. 517, 520 (1976). Under this test, the trial court's finding that Supton's personal involvement in investigating the Iacono charges while at the NLRB did not amount to substantial responsibility was clearly erroneous. See Fed. R. Civ. P. 52(a); Unified Sewerage Agency v. Jelco, 646 F.2d at 1351. Supton's personal involvement in the investigation of Iacono's charges was both important and material in the work of the NLRB. The facts presented in the record clearly show a violation of Disciplinary Rule 9-101(B), thus making the disqualification of Supton proper.

III. Disqualification of Van Bourg Under Disciplinary Rule 5-105(D).

The defendants argue that even if Supton should not be permitted to participate further in the Iacono matter, the entire law firm need not be disqualified. We disagree.

This court has held that an entire law firm must be disqualified when one of its members was counsel for an adverse party in a substantially related matter. Trone v. Smith, 621 F.2d 994, 999 (9th Cir. 1980). Moreover, Disciplinary Rule 5-105(D) states that "if a lawyer is required to decline employment or to withdraw from employment under a disciplinary rule, no partner, or associate, or any other lawyer associated with him or his firm,

may accept or continue such employment." Model Code DR 5-105(D)(1979). Since Supton is disqualified from representation of the defendants in the Iacono matter, disqualification of Van Bourg appears necessary.

Defendants urge, however, that we adopt a limited exception to firmwide vicarious disqualification where the attorney who must be disqualified is "screened" from financial interest and participation in the case. See generally Comment, The Chinese Wall Defense to Lawyer Disqualification, 128 U. P. L. Rev. 677 (1980). They urge that this exception is particularly necessary where the attorney's prior representation was in the capacity of a government employee. See ABA Comm.

on Ethics and Professional Responsibility Formal Op. 342, at 11-12 (1975), reprinted in 62 A.B.A.J. 517, 521 (1976); Murphy, Vicarious Disqualification of Government Lawyers, 69 A.B.A.J. 299 (1983).[10/]

In Trone v. Smith, we left open the question of whether firmwide disqualification would be necessary if such a "Chinese wall" screening procedure were used. 621 F.2d at 999 n.4. Again, we need not resolve this issue, because the record in this case does not show that any such screening procedure was in place at the Van Bourg firm. Although the record shows that Supton did not work on the Iacono case while at the Van Bourg firm and did not enter a formal appearance in

the case, there is no evidence that a "Chinese wall" was in place at the Van Bourg firm. A Van Bourg attorney stated at the time Supton was hired, the firm had made no effort to determine what matters Supton had handled or been in contact with while at the NLRB and indeed that the firm "never asks" about what was learned at a prior employment. Moreover, there is no evidence of specific measures the firm took to avoid either inadvertent or intentional disclosure of information concerning Supton's involvement with this case either directly or indirectly. Thus, we find the district court did not err in holding the Van Bourg firm disqualified.

IV. Waiver of Disqualification Claim by Delay.

Defendants argue last that plaintiff waived its right to seek disqualification of Van Bourg because it delayed over eight months from Van Bourg's hiring of Supton in August 1980 until requesting disqualification of the firm on April 23, 1981. We disagree.

The record fails to demonstrate that Iacono or its attorneys learned any earlier than late February 1981 that Supton had joined Van Bourg. Since defendants seek to avoid an otherwise proper disqualification of the defendants' law firm, defendants have the burden of making a clear showing of the facts from which a

finding of waiver may flow. In light of the showing made here, we have no basis to conclude that Iacono learned of Supton's affiliation with Van Bourg earlier than February 1981.[11/]

Under these circumstances, the district court did not err in finding six weeks a reasonable time in which to seek a disqualification order and that Iacono did not waive its right to seek disqualification of Van Bourg. Cf. Trust Corp. of Montana v. Piper Aircraft Corp., 701 F.2d 85, 87-88 (9th Cir. 1983)(affirming denial of disqualification request where request made two years and six months after learning of potential ground for disqualification).

CONCLUSION

We believe the record reveals a "sound basis" for the district court's action in disqualifying defendants' law firm. Gas-A-Tron of Arizona v. Union Oil Co. of California, 534 F.2d at 1325. We therefore affirm.

FOOTNOTES

1/ An order granting the disqualification of an attorney is appealable immediately as a final collateral order under § 1291. In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 658 F.2d 1335, 1358 (9th Cir. 1981), cert. denied, 102 S.Ct. 1615 (1982).

2/ The defendants remaining in the present action are the Construction and General Laborers Union, Local 304 (Local 304) and the Alameda Building and Construction Trades Council (Alameda).

3/ While Supton was present at a status conference on March 6, 1981, attended by attorneys for defendants and Iacono at which the case was discussed, both parties agree that Supton did not enter a formal appearance at the conference. The explanation provided by Van Bourg for Supton's presence at the hearing is that Supton had a hearing in an unrelated matter at the same time as the hearing on the Iacono case. After Supton finished with his hearing he came to the Iacono status conference and waited in the audience for Van Bourg to finish so that Van Bourg could give Supton a ride back to the office.

4/ For example, Local Rule 1.3(d) of the United States District Court for the Central District of California provides:

> Every member of the bar of this Court and any attorney permitted to practice in this Court under paragraph (b) hereof shall familiarize himself with and comply with the standards of professional conduct required of members of the State Bar of California and contained in the State Bar Act, the Rules of Professional Conduct of the State Bar of California, and decisions of any court applicable thereto, which are hereby adopted as standards of professional conduct of this Court. This specification shall not be interpreted to be exhaustive of the standards of professional conduct. In that connection, the Code of Professional Responsibility of the American Bar Association should be noted. No attorney admitted to practice

> before this Court shall engage in any conduct which degrades or impugns the integrity of the Court or in any matter interferes with the administration of justice therein.

C.D.Cal.R. 1.3(d)(emphasis added). Local Rule 9(d) of the United States District Court for the Eastern District of California and Local Rule 110-5 of the United States District Court for the Southern District of California also contain specific references to the Model Code as a source of ethical standards for attorneys appearing before the district court. See E.D.Cal.R. 9(d); S.D.Cal.R. 110-5.

5/ Prior to January 1, 1975, the Rules of Professional Conduct of the State Bar of California specifically referred to the ABA Model Code as a source of ethical standards for members of the California Bar. See Cal. Bus. & Prof. Code § 6076 app. (Rule 1) (West 1974). Such an explicit reference no longer obtains. See Cal. Civ. & Crim. Rules Code (Rules of Prof. Conduct of State Bar of Cal.) R. 1-100, at 532 (West 1981).

6/ Despite the deletion in 1975 of a reference to the ABA Model Code in the Rules of Professional Conduct of the State Bar of

California, see supra note 5, the California courts continue to rely on the Model Code in addressing issues not covered precisely by the Rules of Professional Conduct of the State Bar of California. In Chambers, for example, a California appellate court overturned the disqualification of the counsel for plaintiffs who were suing the state for negligence, where the attorney had allegedly acquired confidential information regarding the case while in his previous position in the California Department of Transportation, on the ground that the Model Code,

as interpreted by the ABA Committee on Ethics and Professional Responsibility Formal Op. 342 (1975), reprinted in 62 A.B.A.J. 517 (1976), required disqualification only where the former government attorney had "substantial responsibility" over matters related to the case in his previous governmental position. 121 Cal. App.3d at 903, 175 Cal.Rptr. at 581. Citing Chadwick v. Superior Court, 106 Cal.App.3d 108, 164 Cal. Rptr. 864 (1980), the Chambers court specifically stated that the Model Code served to guide California courts in establishing ethical standards. 121 Cal.App.3d at 898 n.3, 175 Cal.Rptr. at

578 n.3. Since the power of the state courts in the interpretation of state law is supreme, Cramp v. Board of Public Instruction, 368 U.S. 278, 285 (1961); United States v. City of St. Louis, Branch 343, 597 F.2d 121, 124 (8th Cir. 1979), we do not question the policy of the California courts in applying the Code after the state legislature has omitted reference to it.

7/ Although Supton's former client was, strictly speaking, the NLRB, in that employment he was called upon to investigate the complaints of Iacono to determine whether the Board should

press unfair labor charges against the defendants. In this special circumstance, we find that the actual former "client" for purposes of a disqualification analysis was Iacono.

8/ See also Model Code EC 9-3 (1979)("After a lawyer leaves judicial office or other public employment, he should not accept employment in connection with any matter in which he had substantial responsibility prior to his leaving, since to accept employment would give the appearance of impropriety even if none exists"). We note that the Ethical Considerations under the Model Code are merely aspirational

and not mandatory, even in those jurisdictions that have explicitly adopted the Model Code as the code for discipline of its lawyers. See Model Code prelim. statement (1979).

9/ A rule requiring the disqualification of a former government attorney in a new representation not merely where the attorney had substantial responsibility in the same matter while he was a public employee but also where the attorney's prior representation is substantially related to the present representation could hinder the mobility of government attorneys into private practice and thereby penalize public service

and make government recruitment more difficult. See generally ABA Comm. on Ethics and Professional Responsibility Formal Op. 342, at 4 & n.14, 10 (1975), reprinted in 62 A.B.A.J. 517, 518 & n.14, 521 (1976).

10/ On the elements of a "Chinese wall," see generally Comment, supra, 128 U. Pa. L. Rev. at 713 (screen should include prohibitions and sanctions against discussion of confidential matters); Murphy, supra, 69 A.B.A.J. 299; Armstrong v. McAlpin, 625 F.2d 433, 442 (2d Cir. 1980), (wall included exclusion from participation in

the action, absence of access to relevant files, and rule against discussion of the case in the presence of the ex-government lawyers), vacated on other grounds, 449 U.S. 1106 (1981); Kesselhaut v. United States, 555 F.2d 781, 793 (Ct.Cl. 1977)(per curiam) (screening procedure upheld included exclusion of former attorney from connection with case, absence of access to files, and salary with no participation in firm earnings).

11/ The record indicates that the attorney presently responsible for the Iacono matter (Robert Zaletel) did not learn from an attorney previously assigned to the

case (Mark R. Thierman) of Supton's affiliation with Van Bourg until late February 1981. Although the record shows that Supton's name first appeared on the Van Bourg letterhead in August 1980, it is devoid of any evidence that Iacono or its attorneys took note of the appearance of Supton's name before late February 1981, when Thierman himself learned and told Zalatel of Supton's affiliation with Van Bourg. Cf. Trust Corp. of Montana v. Piper Aircraft Corp., 701 F.2d 85, 86-88 (9th Cir. 1983) (waiver upheld where adverse party was informed of lawyer's new representation and possible

conflict immediately upon lawyer's assumption of new representation, two and a half years prior to disqualification motion).

APPENDIX B JUN 26, 1981

WILLIAM L. WHITTAKER
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

PAUL E. IACONO STRUCTURAL ENGINEERS, INC., Plaintiff, v. ROBERT R. HUMPHREY, etc., Defendants.	CIVIL NO. C-78-1006 WHO MAGISTRATE'S RECOMMENDATION RE DISQUALIFICATION OF COUNSEL

This matter has been referred to me pursuant to Stipulation for a determination of plaintiff's damages. The court has already granted the plaintiff partial summary judgment on the issue

IT IS SO ORDERED
WILLIAM H. ORRICK
U.S. DISTRICT JUDGE

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of liability which defendants' counsel has advised me will be the subject of an appeal once the damage issue is resolved.

Subsequent to reference to me, I have attempted to set this matter for pretrial and hearing on several occasions, but have been required to grant continuance due to a new attorney in the Littler law firm, who represents plaintiffs, being assigned to the case. On March 27, 1981, I notified all counsel that the matter would be set down for hearing for a Status Conference scheduled for May 22, 1981. Discovery was cut off at the March hearing. At the March hearing, plaintiff's counsel advised me he intended to move to disqualify the

defendants' counsel, the law firm of Van Bourg, Allen, Weinberg & Roger, as attorneys of record in this case. Such a motion was noticed for hearing before me on May 22, 1981, the hearing date I advised all counsel the matter would be set for trial. On May 22, 1981, I set the matter for trial on October 26, 1981.

Plaintiff's motion to disqualify the Van Bourg, Allen, Weinberg & Roger law firm is predicated upon that law firm having hired one Paul Supton as an associate attorney in August 1980. Prior to becoming a member of the Van Bourg law firm, Mr. Supton was a staff attorney for the National Labor Relations Board (NLRB). As staff attorney for the NLRB, Mr. Supton

conducted an investigation of a complaint by Iacono regarding unfair labor practices of the defendants in this case. These unfair labor practices are the basis of the plaintiff's civil lawsuit for damages here. Further, we understand the NLRB's rulings on Iacono's complaint of unfair labor practices were considered by the assigned judge and constituted one of the reasons for his granting partial summary judgment on the liability issue.

During the course of his investigation of Iacono, NLRB's complaint, Mr. Supton interviewed employees and officers of the plaintiff's business. These affidavits were utilized in the NLRB administrative hearing and according to Mr. Van Bourg, were

disclosed in a related action in a proceeding before this court. The record in this matter discloses that at one status hearing held before me, Mr. Supton was present, although it is not clear if he participated in any discussion at that time.

By way of affidavit and closing oral argument on the motion, Mr. Van Bourg asserted that Mr. Supton has not participated in any legal activity relating to this litigation since becoming associated with his law firm in August 1980, nor has he discussed the case with members of that firm or his involvement with plaintiff while a staff attorney for the NLRB. Mr. Van Bourg vigorously opposes the disqualification of his law firm as it would cause his clients additional

expenses by way of attorney's fees to have new counsel become acquainted with the legal and factual issues involved in this litigation. Further, Mr. Van Bourg charges the Littler firm of other than unethical tactics in bringing this motion so late in the game, considering that law firm had knowledge for several months past of Mr. Supton having become associated with his office. The Littler firm in bringing this disqualification motion, makes no charges direct or indirect by innuendo or inference of any unethical conduct on the part of Mr. Supton or the Van Bourg firm regarding this case. Their sole basis is the possibility or appearance of the possibility of impropriety on the part of an attorney because of his prior

representations of a client. Actual disclosure of privileged client information is not at issue here. Cases support the proposition that actual disclosure of former client information is not required to result in the disqualification of an attorney.

Plaintiff relies heavily on Trone v. Smith, 621 F.2d 994 (9th Cir. 1980) as authority to justify disqualification. In Trone, the circuit discusses the mere appearance of impropriety or the appearance of a breach of confidence as being sufficient to require disqualification. Plaintiff also cites the ABA Code of Professional Responsibility Ethical Consideration (EC) 9-3 and Disciplinary Rule 9-101B regarding the prohibitions of an attorney in public employment

in which he had substantial responsibility accepting private employment in a related matter. See Handelman v. Weiss, 368 F.Supp. (S.D.N.Y. 1973).

I cannot find from what has been presented to me that Mr. Supton had a substantial responsibility in investigating Iacono's complaint to the NLRB. Likewise, there is nothing before me that he accepted employment with the Van Bourg law firm because of that firm's involvement in this litigation which can be characterized as collateral to the NLRB proceedings. However, with Mr. Supton's prior association with the NLRB investigation, his appearance with Mr. Van Bourg before me at a status conference where the background of this litigation was discussed, compels me to reluctantly

find there is an appearance of impropriety which under the ABA Code of Professional Conduct required that I recommend to the assigned judge that Mr. Supton and his employer, the law firm of Van Bourg, Allen, Weinberg & Roger, be disqualified from any further representation of the defendants Robert R. Humphrey, individually and as Representative of Laborers Fund Administrative Office of Northern California, Inc.; Doug Whitt, individually and as Agent and Officer of Local Union No. 304 of the Northern California District Hodcarriers, Building and Construction Laborers and Alameda Building Trades Council; Joe Tibbs, individually and as Agent for Laborers Local 304 and Alameda

Building Trades Council; and H. Gordon Douglas, individually and as Agent for Laborers Contract Administrative Trust Fund, in this case. In making this recommendation I make a specific find [sic] that there has been no unethical conduct carried out by Mr. Supton or the Van Bourg law firm with respect to this litigation.

DATED: June 8, 1981

Respectfully submitted,

FREDERICK J. WOELFLEN
United States Magistrate

IT IS SO ORDERED

26 JUN 1981

WILLIAM H. ORRICK
U.S. DISTRICT JUDGE

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No. 83-168

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CONSTRUCTION AND GENERAL LABORERS UNION LOCAL 304 AND ALAMEDA BUILDING AND CONSTRUCTION TRADES COUNCIL
Petitioners,

v.

PAUL E. IACONO STRUCTURAL ENGINEER, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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PAUL E. IACONO STRUCTURAL ENGINEER, INC.

September 1, 1983

THE CASILLAS PRESS, INC. – 1717 K Street N.W. – Washington, D.C. – 223-1220

QUESTION PRESENTED

Have the Petitioners stated any ground for the issuance of a Writ of Certiorari authorized by Rule 17 of the United States Supreme Court Rules in their request that this Court hold that the District Court abused its discretion in ordering disqualification of Petitoners' law firm, which employed a former government attorney without any screening measures and without obtaining the consent of the government, while at the same time this firm represented the Petitioners in a civil action arising out of a matter in which the government attorney had substantial responsibility while with the government?

PARTIES TO THE PROCEEDINGS BELOW

Plaintiff in this action and Respondent before this Court is Paul E. Iacono Structural Engineer, Inc., a California corporation.[1] The Defendants-Petitioners are Construction and General Laborers Union Local 304 and Alameda Building and Construction Trades Council, both labor organizations.

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[1]Paul E. Iacono Structural Engineer, Inc. has no parent or subsidiary corporations (Supreme Court Rule 28).

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IN THE

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OCTOBER TERM, 1983

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

OPINION BELOW

The opinion rendered by the Court of Appeals for the Ninth Circuit is set forth as Appendix A to the Petition for Writ of Certiorari (hereinafter "Appendix A"). The Magistrate's recommendation re disqualification of counsel, which was adopted by the United States District Court for the Northern District of California, is not reported and is set forth as Appendix B to the Petition for Writ of Certiorari (hereinafter "Appendix B").

JURISDICTION

The jurisdiction of this Court and of the Court of Appeals is correctly set forth in Petitioners' Brief for Writ of Certiorari (hereinafter "Petitioners' Brief").[2]

REGULATIONS INVOLVED

This case involves Canon 9 and Disciplinary Rules 5-105(D) and 9-101(B) of the American Bar Association Code of Professional Responsibility, as set forth in Petitioners' Brief.

STATEMENT OF THE CASE

A. Procedural Posture And Disposition In The Trial And Appellate Courts.

On May 5, 1978 Plaintiff-Respondent Paul E. Iacono Structural Engineer, Inc. (hereinafter "Iacono" or "Plaintiff" or "Respondent") filed its Complaint for Damages and Declaratory Relief against several defendants, in-

[2]In *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 372, n.8 (1981), this Court left open the issue of whether orders disqualifying counsel were appealable under 28 U.S.C. § 1291 as a *Cohen* collateral order. *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541 (1949).

The Ninth Circuit has held that an order granting disqualification of counsel is appealable. *In re Coordinated Pretrial Proceedings In Petroleum Products Antitrust Litigation*, 658 F.2d 1355 at 1356-58 (9th Cir. 1981) *cert. denied*, 455 U.S. 990 (1982). Other circuits are in accord; *Cossette v. Country Style Donuts, Inc.*, 647 F.2d 526 (5th Cir. 1981); *Board of Education v. Nyquist*, 590 F.2d 1241 (2d Cir. 1979); *Duncan v. Merrill Lynch, Pierce, Fenner & Smith*, 646 F.2d 1020 (5th Cir. Unit B 1981), *cert. denied*, 454 U.S. 895 (1981); *Aetna Casualty & Surety Co. v. United States*, 570 F.2d 1197, 1200 (4th Cir. 1978), *cert. denied*, 439 U.S. 821 (1979); *Richardson v. Hamilton International Corp.*, 469 F.2d 1382 (3rd Cir. 1972), *cert. denied*, 411 U.S. 886 (1973); *Community Broadcasting of Boston, Inc. v. F.C.C.*, 546 F.2d 1022, 1025, n.12 (D.C. Cir. 1976).

cluding, *inter alia,* the Construction and General Laborers Union, Local 304 and the Alameda Building and Construction Trades Council (hereinafter "Defendants" or "Petitioners"). Presently only these two Defendant labor organizations remain in this action. Iacono is seeking damages from the Petitioners as a result of their illegal secondary picketing of Plaintiff's Pleasanton, California construction site in the spring of 1978. Iacono's claims are based on Section 303 of the Labor-Management Relations Act (LMRA) (29 U.S.C. § 187), which permits any person "injured in his business or property," as a result of a secondary activity in violation of Section 8(b)(4) of the National Labor Relations Act (29 U.S.C. § 158(b)(4)), to bring suit to recover damages sustained (Appendix A, pp. 3-5). The matter was assigned to Magistrate Frederick J. Woelflen pursuant to 28 U.S.C. § 636(b)(2)(C).

On April 23, 1981, Iacono filed a Motion for an Order Disqualifying the law firm of Van Bourg, Allen, Weinberg & Roger (hereinafter the "Van Bourg Law firm"). After hearing and upon consideration of supporting papers filed by both parties, Magistrate Woelflen issued a Recommendation that the Van Bourg law firm be disqualified. On June 26, 1981, the Honorable William H. Orrick, United States District Judge for the Northern District of California, approved Magistrate Woelflen's Recommendation Re Disqualification of Counsel and ordered that the law firm be disqualified from any further representation of the Defendants in this case (Appendix B).

The Ninth Circuit affirmed the District Court's disqualification order in a lengthy opinion filed on May 3, 1983 (Appendix A). On August 1, 1983, Petitioners filed a Petition for Writ of Certiorari with this Court to which the instant pleading is addressed.

B. Statement Of The Facts.

The District Court's Order disqualifying the Van Bourg law firm (which was affirmed by the Ninth Circuit) is based upon the fact that one of the attorneys employed by that law firm, Paul Supton, previously served as a staff attorney for the National Labor Relations Board ("NLRB") and, while employed by the NLRB, was actively involved in the investigation and disposition of unfair labor practice charges filed by Plaintiff against the Defendants. These unfair labor practice charges form the basis for the instant lawsuit for damages under Section 303 of the LMRA. While handling Plaintiff's unfair labor practice charges, Supton took a number of affidavits from key employee witnesses of Iacono. These affidavits described in detail interruptions in work at the jobsite caused by Defendants' secondary picketing and distribution of leaflets at Plaintiff's jobsite. These statements were taken by Supton with a pledge that they would be kept confidential unless produced at a hearing or trial.[3]

During the course of Supton's investigation, he had numerous discussions with the Plaintiff's attorney regarding the Plaintiff company and all aspects of the illegal secondary activity by the Defendants.

Supton had primary responsibility for settlement discussions which were held in one of these unfair labor practice cases (Appendix A, pp. 3-5).

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[3]The record is unclear as to whether all these statements were ever made public. NLRB statements are not recoverable prior to trial under the Freedom of Information Act or by request of opposing counsel. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978); NLRB Rules and Regulations, Section 102.117. Moreover, Supton undoubtedly received information in confidence from Plaintiff, Plaintiff's counsel and other witnesses which was not set forth in the written statements.

As a result of Supton's involvement in these unfair labor practice cases, he gained an extensive knowledge of the facts of the present case, and such information would be relevant to the resolution of Plaintiff's Section 303 action.

Supton joined the Van Bourg law firm in August 1980. While Defendants disavowed any involvement by Supton in the instant case since he joined the Van Bourg law firm, he was present (although he did enter a formal appearance) at a status conference at which the background of this litigation was discussed.

At the time he was hired, the Van Bourg firm did not inquire of Supton as to the possibility of conflicts of interest based upon his NLRB experience (Appendix A, p. 29). The law firm did not prohibit discussions between Supton and other Van Bourg attorneys with regard to the Iacono matter, or otherwise take any measures, formal or informal, to isolate Supton from the Van Bourg attorneys working on the Iacono matter in order to ensure that Supton's knowledge would not intentionally or accidentally be disseminated to other members of the firm. Nor was he excluded from all financial reward from the case that might be reflected in year-end bonuses or the like (Appendix A, pp. 6-7). The law firm made no effort to contact the NLRB office where Supton had been employed to discuss any possible conflict of interest.

SUMMARY OF ARGUMENT

Petitioners have stated no valid reason for certiorari to be granted under the criteria set forth in Rule 17 of the United States Supreme Court's Rules (hereinafter "Supreme Court Rule 17"). As this Court and others have long recognized, it is the District Court which has primary responsibility for controlling the conduct of attorneys

practicing before it. Consequently, an Order disqualifying counsel will not be disturbed if the record reveals "any sound basis" for the Court's action (see cases *infra*).

In the United States District Court for the Northern District of California, attorneys' conduct is regulated by the State Bar Act of California and the Rules of Professional Conduct of the State Bar of California (following the California Rules of Court), as well as by the American Bar Association Code of Professional Responsibility (hereinafter "ABA Code") (Appendix A, pp. 15-16). Despite the fact that both the state ethical rules and the ABA Code prohibit continued representation by the Van Bourg law firm under the circumstances present here, Petitioners have nonetheless asked this Court to rewrite the ABA Code and to make this new Code binding upon all federal practitioners. Petitioners state "this case virtually screams out for this Court to exercise its supervisory powers to articulate standards for the vicarious disqualification of an entire law firm which has employed a former government attorney" (Petitioners' Brief, p. 18). In asking this Court to rewrite the ABA Code so as to create a new ethical rule on vicarious disqualification heretofore never adopted by the ABA or any court, Petitioners have apparently misconstrued the function of this Court as articulated in Supreme Court Rule 17.

Plaintiff is anxious to bring its case to trial as soon as possible. The granting of Defendants' petition would create further needless delay which would prejudice Plaintiff upon trial of this matter. For the foregoing reasons, Defendants' Petition for Writ of Certiorari should be denied in its entirety.

ARGUMENT AT LAW

A. The District Court Did Not Abuse Its Discretion In Ordering The Disqualification Of The Van Bourg Law Firm, Based On DR 9-101(B) and DR 5-105(D) Of The ABA Code Of Professional Responsibility.

The primary responsibility for controlling the conduct of Lawyers practicing before the District Court lies with that Court. As this Court recognized in *Firestone Tire & Rubber Co. v. Risjord,* 449 U.S. 368, 377 (1981), decisions regarding disqualification of counsel are particularly within the ambit of the District Court judge, as each such decision "ordinarily turns on the particular factual situation of the case then at hand . . . ."

Accordingly, it has long been held that an order disqualifying counsel will not be disturbed if the record reveals "any sound basis" for the court's action. *Gas-A-Tron of Arizona v. Union Oil Co. of California,* 534 F.2d 1322, 1325 (9th Cir. 1976), *cert. denied,* 429 U.S. 861 (1976); *In re Taylor,* 567 F.2d 1183, 1191 (2d Cir. 1977); *Coffelt v. Shell,* 577 F.2d 30, 32 (8th Cir. 1978); *United States v. Dinitz,* 538 F.2d 1214, 1219 (5th Cir. 1976), *cert. denied,* 429 U.S. 1104 (1977); *Fred Weber, Inc. v. Shell Oil Co.,* 566 F.2d 602, 605 (8th Cir. 1977), *cert. denied,* 436 U.S. 905 (1978).

In the instant case, the Ninth Circuit properly determined that the District Court did not abuse its discretior in ordering the disqualification of the Van Bourg law firm Petitioners apparently concede that Supton's individua disqualification was required under Disciplinary Rul

9-101(B) of the ABA Code (hereinafter "DR____").[4] Curiously enough, Petitioners do not actually argue in their Brief that the District Court abused its discretion in ordering the disqualification of the Van Bourg law firm based upon Disciplinary Rule 5-105(D) of the ABA Code.[5] Rather, Petitioners ask this Court to rewrite the ABA Code by fashioning a new ethical rule not heretofore accepted by any court in this country, and contrary to the ABA opinions in this area. Petitioners would have this Court rewrite DR 5-105(D) of the ABA Code so as to allow continued representation of a law firm in cases where DR 9-109(B) was violated, even if that firm took no measures to screen the former government attorney from either legal or financial involvement in the matter.

Formal Opinion No. 342 of the ABA Commission on Professional Ethics, Opinions (1975), reprinted in 62 ABA J. 517, 521 (1976), suggests that in certain cases disqualification of a firm can be avoided if proper screening procedures are followed. That opinion suggests that if the government agency is satisfied that the screening measures will effectively isolate the individual lawyer from participating in a particular matter and sharing in the fees attributable to it and there is no appearance of significant

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[4]Disciplinary Rule 9-101(B) states "a lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee." Canon 9 of the ABA Code states "a lawyer should avoid even the appearance of professional impropriety."

[5]Disciplinary Rule 5-105(D) provides "if a lawyer is required to decline employment or to withdraw from employment under a disciplinary rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment."

impropriety affecting the interests of the government, the government may waive the disqualification of the firm which would otherwise be required under DR 5-105(D). Most courts, including the Ninth Circuit, have never approved of the screening procedures suggested in ABA Opinion No. 342. *Trone v. Smith*, 621 F.2d 994, 999, n. 4 (9th Cir. 1980); *Westinghouse Electric Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1321 (7th Cir. 1978), *cert. denied*, 439 U.S. 955 (1978); *Schloetter v. Railoc of Indiana, Inc.*, 546 F.2d 706, 711 (7th Cir. 1976); *Handelman v. Weiss*, 368 F.Supp. 258 (S.D.N.Y. 1973); *Fund of Funds, Ltd. v. Arthur Andersen Co.*, 435 F.Supp. 84, 96 (S.D.N.Y. 1977), *aff'd in part, rev'd in part*, 567 F.2d 225, 229, n. 10 (2d Cir. 1977); *In re Asbestos Cases*, 514 F.Supp. 914, 924-25 (E.D. Va. 1981).

As noted in Petitioners' Brief, several courts have approved of the screening and waiver method suggested by Opinion No. 342. *See Armstrong v. McAlpin*, 625 F.2d 433, 442 (2d Cir. 1980), *vacated on other grounds*, 449 U.S. 1106 (1981); *Kesselhaut v. United States*, 555 F.2d 791, 793 (Ct. Cl. 1977) (per curiam). However, as correctly noted by the Ninth Circuit in its decision (Appendix A, p. 28), the issue of whether firm-wide disqualification would have been necessary if a screening procedure as suggested in Opinion No. 342 had been used is not before this Court, as Petitioners have admitted that no such screening procedures were used in this case. In fact, a Van Bourg attorney stated that at the time Supton was hired the firm made no effort to determine what matters Supton had handled or had been in contact with while at the NLRB, and that the firm "never asked about what was learned at a prior employment" (Appendix A, p. 29). There is no evidence in the record of any specific measures the Van Bourg firm took to avoid either inadvertent or intentional disclosure of information concerning Supton's involve-

ment with the case (Appendix A, pp. 25-29). The Van Bourg firm did not even discuss the potential conflict of interest with Supton's former employer (the NLRB), let alone receive a waiver from the NLRB after enacting screening measures. Moreover, Supton was present at a status conference during which this litigation was discussed (Appendix A, p. 34). In sum, since the screening and waiver procedure suggested in Opinion No. 342 (and used in the cases cited by Petitioners on pages 11-12 of their Brief) was not utilized by the Van Bourg law firm, this Court need not consider the propriety of such procedure.

Petitioners would have this Court believe that the "overwhelming weight of authority" is contrary to the Ninth Circuit's decision affirming firm-wide disqualification. (Petitioners' Brief, p. 8). Nothing could be further from the truth. In fact, Petitioners have failed to cite a single case in which continued representation was permitted under circumstances such as those found here. The two cases relied upon by Petitioners in which firm-wide disqualification was not ordered are wholly inapposite because in these cases an adequate screening procedure had been used. In *Kesselhaut v. United States*, 555 F.2d 791, 793 (Ct. Cl. 1977) (per curiam), detailed screening procedures were immediately put into place upon the employment of the former government attorney, which included the exclusion of the former government attorney from all connection with the case, the denial of access to the files, and a salary scheme for the attorney which included no participation in the firm's earnings. Moreover, in *Kesselhaut*, the former government attorney had held a high level supervisory position while with the government, which provided him with only a peripheral knowledge of the case. In contrast, Supton was intimately involved in and had substantial responsibility for the NLRB cases which form the basis of the instant action.

Similarly, in *Armstrong v. McAlpin*, 625 F.2d 433, 442 (2d Cir. 1980), *vacated on other grounds*, 449 U.S. 1106 (1981) (also distinguished by the Ninth Circuit, Appendix A, pp. 43-44), the strict screening procedures which were implemented included exclusion from participation in the action (including an exclusion from remuneration based on fees from the case), the absence of access to relevant files, and a rule against discussion of the case in the presence of the ex-government lawyer. The *Armstrong* case is further distinguishable from the case at bar after even a cursory examination of the factual context in which the disqualification motion arose. There, the issue was the propriety of the disqualification of a law firm attempting to represent the receiver for a corporation which had been the subject of a Securities Exchange Commission ("SEC") fraud action. A disqualification motion had been brought based upon the fact that an attorney employed by the law firm had previously been an assistant director with the SEC and had high-level supervisory responsibility over the fraud action. In contrast to the instant case, the SEC's interests were squarely aligned with those of the subject law firm, as part of the receiver's obligation was, like the SEC, to institute legal action against the corporation. Accordingly, all of the SEC's files had been turned over to the receiver long before the former government attorney had been hired. The *Armstrong* case does not even suggest that continued representation of the firm would have been appropriate under the circumstances found here.

In sum, there is no authority whatsoever to support the rule which Petitioners would have this court fashion, i.e., that vicarious disqualification is not required even if the recommendations found in ABA Opinion No. 342 are not followed.

In addition to being in conformity with case law in the area, there are sound policy reasons in support of the District Court and Ninth Circuit's rulings below. Disciplinary Rule 9-101(B) of the ABA Code commands "a lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee." The policy reasons for disqualifying a former government attorney who participated in the same manner while in government service are expressed in Opinion No. 342 of the ABA Ethics Committee, *supra.* Opinion No. 342 identifies these concerns as follows: (1) The treachery of switching sides, (2) the safeguarding of confidential information from future use against the government, (3) the need to discourage government lawyers from handling particular assignments in such a way as to encourage their own future employment and (4) the professional benefit derived from avoiding the appearance of impropriety. Formal Opinion No. 342 of the ABA Committee on Professional Ethics, Opinions (1975) reprinted in 62 ABA J. 517, 521 (1976).

Furthermore, it is also well established that Supton need not actually have disclosed any information in order for the Van Bourg law firm to be disqualified This is based upon the principle that it is the possibility of the breach of confidence, not the actual breach, which is significant. *Trone v. Smith, supra,* 621 F.2d at 999; *General Motors Corp. v. City of New York,* 501 F.2d 639 (2d Cir. 1974); *Telos, Inc. v. Hawaiian Telephone Co.,* 397 F.Supp. 1314 (D. Hawaii 1975).

Disciplinary Rule 5-105(D) (which requires the vicarious disqualification of an entire law firm if one attorney is disqualified) is also based upon sound policy reasons. This rule has been said to reflect the normally close personal and financial relations among members of a law firm and

the ease of communications among them. It has also been attributed to the concept that since all members of a law firm share in the ethical obligation to any member's client, all the firm's members should be subject to common ethical restrictions. Lacovara, P., *Restricting The Private Practice Of Former Government Employees,* 20 Ariz. L. Rev. 369, 379 (1978). In addition, the concept of "imputed knowledge" also normally operates to attribute to an attorney the confidences and secrets held by other attorneys in his firm. As is stated in *In re Asbestos Cases, supra,* 514 F.Supp. at 922:

> Because of the continuing danger that an attorney may unintentionally transmit information gained through the attorney's prior association due to the day-to-day contact an attorney has with other members of his firm, disqualification is required to guard against the possibility of inadvertent use of confidential information. This disqualification is required without showing that an attorney possessed explicit confidences which were expressly transmitted to or received by the other members of the law firm during some conference, letter-drafting or phone conversation and is required whether or not the other members of the firm are actually exposed to the information. The threat remains that the firm may have been tainted by the improper receipt of privileged information and it is the possibility of the breach of confidence, not the fact of the breach that triggers disqualification.

[Citations omitted.]

Moreover, that hardship might result from the disqualification of the Van Bourg law firm in the instant case is not an excuse for their failure to adhere to Canon 9 of

the ABA Code and Disciplinary Rule 9-101(B). As is stated in *In re Asbestos Case, supra,* 514 F.Supp. at 925-26:

> The Court acknowledges the hardship claimed by Greitzer and Locks [the disqualified law firm] in disqualifying it from participating further in the Norfolk litigation. This hardship quite properly rests with the firm which knowingly undertook the employment of an individual in the face of the Code's clear prohibition, without first securing a Government waiver and seeking approval of the screening procedures from this Court.[6]

In the instant case, Iacono's motion for disqualification was not designed to produce further delay in this action. Iacono has the burden of proving its damages at trial, and hence any harm that might result from delay as a result of these disqualification proceedings would probably be felt most keenly by Iacono should the passage of time impair the parties' ability to obtain witnesses and elicit testimony from them at trial. Iacono is anxious to press this case to trial to recover the damages to which it is entitled. Iacono brought its motion because it believed strongly that it is entitled to a trial free from even the taint of possible impropriety on the part of the Van Bourg law firm. Should this frivolous Petition for Certiorari be granted, considerable unnecessary delay will once again be caused by the appeal process. The Court would be greatly prejudic-

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[6]In *In re Asbestos Cases,* 514 F.Supp. 914 (E.D. Va. 1981), the district court held that an attorney who was involved in asbestos litigation while he worked for the government was disqualified (along with the rest of his law firm) from representing plaintiffs in related private asbestos litigation despite attempts of the firm to screen him from any participation in the litigation.

ing Plaintiff for no valid reason if it were to grant this Petition.

CONCLUSION

It has been said that in disqualification situations doubts are to be resolved in favor of disqualification. *Hull v. Celanese Corp.*, 513 F.2d 568, 571 (2d Cir. 1975); *In re Coordinated Pretrial Proceedings In Petroleum Products Antitrust Litigation, supra,* 658 F.2d at 1359 (9th Cir. 1981).

Petitioners have not articulated a valid ground under Supreme Court Rule 17 that would warrant the granting of their Petition for Certiorari. There is no conflict among the Courts of Appeal in this area, as suggested by Petitioners, since the Van Bourg law firm took no screening measures when hiring Supton, and did not obtain a waiver from the NLRB. Petitioners' request that this Court rewrite the ABA Code in a fashion heretofore not accepted by any court or by the ABA does not set forth valid grounds for the granting of their Petition for Certiorari. Accordingly, the Petition must be denied.

DATED: August 30, 1983

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